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position of property is allowed not out of consideration for improvident persons, but upon the principle that the owner of property may dispose of it in whatever manner he pleases.<sup>7</sup> Increasing liberality is being shown in allowing such trusts to be created by reasonable implication rather than requiring actual words of restraint.<sup>8</sup> The beneficiary need not in fact be a spendthrift.<sup>9</sup> The trustee may be given wide or absolute discretion as to the amount to be paid for support or education.<sup>10</sup> But where the cestui is given dominion or a right to obtain dominion over the trust property, by whatever means, his creditor may reach it despite any provisions in the settlement.<sup>11</sup>

In the principal case the California court applies the prevailing American doctrine to a somewhat unusual situation. The defendant beneficiary did not have dominion or the right to obtain control of the trust property under the original settlement. His recourse to the property was subject to the consent of the other beneficiaries to a termination of the trust. A spendthrift trust would have been established in this case had the settlor so provided by the original deed, or if he had given the defendant's co-beneficiaries the right to create it as a condition to their consenting to terminate the trust. This latter right follows from the general rule as above expressed. What prevented this result was the settlor's provision that one-fourth of the trust property should go to the defendant upon *any* termination of the trust, thereby giving him absolute control of his share of the property. This clause prevented the imposition upon his share of any conditions or a resettlement in trust by the co-beneficiaries.

H. E. A.

WATER LAW: APPORTIONMENT BETWEEN RIPARIAN OWNER AND APPROPRIATOR.—In *Mally v. Weidensteiner*<sup>1</sup> the Supreme Court of Washington has materially weakened the doctrine of appropriation and in turn strengthened riparian rights so that they are given a standing not heretofore generally conceded. Washington is one of the few Western states where riparian rights and rights of appropriation exist side by side.<sup>2</sup> Weidensteiner had

<sup>7</sup> *Broadway National Bank v. Adams* (1882), 133 Mass. 170. See Gray, *Restraints on the Alienation of Property*, especially preface to 2nd ed., for a severe criticism of the rule, both as to judicial interpretation and legislative enactment.

<sup>8</sup> *Berry v. Dunham* (1909), 202 Mass. 133, 88 N. E. 904.

<sup>9</sup> *Wagner v. Wagner* (1910), 244 Ill. 101, 91 N. E. 66.

<sup>10</sup> *Keyser v. Mitchell* (1871), 67 Pa. St. 473; *Berry v. Dunham* (1909), 202 Mass. 133, 88 N. E. 904.

<sup>11</sup> In *re Morgan's Estate* (1909), 223 Pa. St. 228, 72 Atl. 498; *Croom v. Ocala Plumbing & Electric Co.* (1911), 62 Fla. 460, 57 So. 243.

<sup>1</sup> (Dec. 8, 1915), 153 Pac. 342.

<sup>2</sup> *Benton v. Johncox* (1897), 17 Wash. 277, 49 Pac. 495; *Nesalhouse v. Walker* (1907), 45 Wash. 621, 88 Pac. 1032; *Mason v. Yearwood* (1910), 58 Wash. 276, 108 Pac. 608.

diverted one and one-half cubic feet of water and appropriated it to a beneficial use for the statutory prescriptive period. During the period of such appropriation the amount thus diverted constituted about one-third of the flow of the stream. The Court said, "During all this time the appellants and other riparian owners below the point of diversion retained their riparian rights and enjoyment to the extent of two-thirds of the water of the creek as completely as the respondent exercised his claim of right to one-third of the water thereof." When the flow of the stream became considerably diminished from other causes, the Court allowed the riparian owner to enjoin the appropriator from diverting more than one-third of the water flowing in the stream even though the appropriator thereby received considerably less than the amount of water which he had diverted and put to beneficial use during the entire period of his adverse use. The Court in effect enforced an equitable apportionment between a riparian owner and an appropriator.

Equitable apportionment between appropriators and riparian owners is a novel principle and heretofore has not been applied except between riparian proprietors in one state and appropriators in another where controversies arose on interstate streams.<sup>3</sup> The theories of riparian and of appropriation rights are fundamentally different. The appropriator acquires an exclusive right to divert a specific amount of water<sup>4</sup> and his title does not depend upon the ownership of any land contiguous to the stream or any land at all<sup>5</sup> but upon diversion for a beneficial use.<sup>6</sup> His right is not subject to apportionment even with other appropriators<sup>7</sup> unless it is expressly so qualified by statute.<sup>8</sup> The riparian owner, on the other hand, has no title to the use of a specific amount of water, but he has merely a right to a reasonable use dependent upon the ownership of land bordering on the stream.<sup>9</sup> His right is not

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<sup>3</sup> *Union Mill & Min. Co. v. Dangberg* (1897), 81 Fed. 73; *Anderson v. Bassman* (1905), 140 Fed. 14; *Kansas v. Colorado* (1906), 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

<sup>4</sup> *Hoffman v. Stone* (1857), 7 Cal. 47; *Hill v. King* (1857), 8 Cal. 336; *Lakeside Ditch Co. v. Crane* (1889), 79 Cal. 572, 21 Pac. 966; *Wutchuma Water Co. v. Pogue* (1907), 151 Cal. 105, 90 Pac. 362.

<sup>5</sup> *Wiel, Water Rights in Western States*, 3rd ed., § 281; *Santa Paula etc. Co. v. Peralta* (1896), 113 Cal. 38, 45 Pac. 168; *Sullivan v. Mining Co.* (1895), 11 Utah, 438, 40 Pac. 709.

<sup>6</sup> *Santa Cruz Reservoir Co. v. Ramirez* (1914), 16 Ariz. 64, 141 Pac. 120; *Leavitt v. Lassen* (1909), 157 Cal. 82, 106 Pac. 404; *Senior v. Anderson* (1896), 115 Cal. 496, 47 Pac. 454; *Trimble v. Heller* (1914), 23 Cal. App. 436, 138 Pac. 376.

<sup>7</sup> *Huning v. Porter* (1898), 6 Ariz. 171, 54 Pac. 584; *City of Telluride v. Blair* (1905), 33 Colo. 353, 80 Pac. 1053; *Avery v. Johnson* (1910), 59 Wash. 332, 109 Pac. 1028.

<sup>8</sup> *Wiel*, 3rd ed., § 309.

<sup>9</sup> *Kinney On Irrigation*, § 276; *Lux v. Haggin* (1886), 69 Cal. 255,

dependent upon user, but is a right to have the water flow past his land substantially undiminished in quantity and unimpaired in quality.<sup>10</sup> The rights of riparian owners are strictly correlative and subject to apportionment between such owners and all the surrounding circumstances are taken into consideration in making such apportionment.<sup>11</sup>

A riparian owner may enjoin an adverse diversion and so prevent an appropriator's right from arising.<sup>12</sup> The diversion may be enjoined even though it causes no appreciable loss or damage to the riparian owner,<sup>13</sup> and even though the appropriator has gone to considerable expense in providing facilities for diversion. A riparian owner may also challenge the appropriator's right if he is diverting more water than he can put to a beneficial use, although he has actually diverted such excess amount for the statutory period.<sup>14</sup>

Thus it would seem that the riparian proprietor is sufficiently protected in his rights. By timely action he can prevent their being lost in the first instance and by subsequent proceedings he can prevent others who have acquired adverse rights from abusing those rights and wasting the water.<sup>15</sup> If, however, a riparian owner stands by and allows another to appropriate and avail himself of the use of water when the riparian owner might have prevented such appropriation rights from attaching, our conception of the law as uniformly applied heretofore, is that he has lost the right to enjoin such use. This would be true even though there was no shortage of water while the appropriator was acquiring his prescriptive right, for the riparian use below is technically interfered with even though there is plenty of water for all.

If Washington carries out the policy indicated in the principal case it will mean a serious curtailment of the appropriation doctrine in that state, for appropriation rights will lose much of their value if the appropriator, after he has acquired only enough water for his necessary use, must divide with riparian owners in time of shortage.

The recent tendency in those Western States where riparian rights are recognized is towards the restriction of those rights

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10 Pac. 674; Wiel, *Water Rights*, 3d ed., §§ 766-775.

<sup>10</sup> *Huffner v. Sawday* (1908), 153 Cal. 86, 94 Pac. 424.

<sup>11</sup> *Gutierrez v. Wege* (1905), 145 Cal. 730, 79 Pac. 449.

<sup>12</sup> *Sanders v. Wilson* (1904), 34 Wash. 659, 76 Pac. 280; *Lux v. Haggin* (1886), 69 Cal. 255, 10 Pac. 674; *Creighton v. Evans* (1878), 53 Cal. 56; *Anaheim Union Water Co. v. Fuller* (1907), 150 Cal. 327, 88 Pac. 978.

<sup>13</sup> *California Pastoral etc. Co. v. Enterprise etc. Co.* (1903), 127 Fed. 741; *San Joaquin etc. Co. v. Fresno etc. Co.* (1910), 158 Cal. 626, 112 Pac. 182; *Rigney v. Tacoma L. & W. Co.* (1894), 9 Wash. 576, 38 Pac. 147.

<sup>14</sup> *California etc. Co. v. Fresno etc. Co.* (1914), 167 Cal. 78, 138 Pac. 718.

<sup>15</sup> *id.*

rather than their enlargement, for it is generally conceded that the doctrine of appropriation is a doctrine permitting of a more economical use of water and for that reason better adapted to the needs of the West.<sup>16</sup>

*E. B. B.*

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<sup>16</sup> A. E. Chandler in 4 California Law Review, 206; Miller & Lux v. Enterprise Canal & Land Co. (1915), 169 Cal. 415, 437, 147 Pac. 579.